Supreme Court U.S.
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No. 01-651

IN THE

Supreme Court of the United States

THE JPMORGAN CHASE BANK, formerly known as
THE CHASE MANHATTAN BANK,
as Indenture Trustee, under the Indenture,
dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI)
INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

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Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, 917 F.2d 278 (7th Cir. 1990) 19

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Charles Ulmer, Inc., Sailmakers v. Van Ost, No. 89 Civ. 7897 (SWK), 1991 WL 29277 (S.D.N.Y. Feb. 26, 1991) 14

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Good Humor Corp. v. Popsicle Japan K.K., 810 F. Supp. 1001 (E.D. Wis. 1992)	13, 14
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Insurance Co. of N. Am. v. Pyramid Ins. Co. of Bermuda Ltd., No. 92 Civ. 1816, 1994 WL 88701 (S.D.N.Y. Mar. 16, 1994)	13

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International Capital Equip., Ltd. v. Computer Atlanta, Inc., 715 F. Supp. 371 (N.D. Ga. 1989)	14
International Minerals & Chem. Corp. v. Cotia Comercio Exportacao E Importacao S.A., No. 85 Civ. 5763 (MJL), 1988 WL 42165 (S.D.N.Y. Apr. 26, 1988)	14
Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp., 719 F.2d 992 (9th Cir. 1983)	13
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Jerguson v. Blue Dot Inv., Inc., 659 F.2d 31 (5th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982)	18
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Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987)	13

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Meritxell, Ltd. v. Saliva Diagnostic Sys., Inc., No. 96 Civ. 2759 (JFK), 1997 WL 411466 (S.D.N.Y. July 18, 1997)	13
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National Union Fire Ins. Co. of Pittsburgh v. Walton Ins. Ltd., 696 F. Supp. 897 (S.D.N.Y. 1988)	14
Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731 (2d Cir. 1983)	13
One Hundred Pearl Ltd. v. Vantage Sec., Inc., 887 F. Supp. 636 (S.D.N.Y. 1995)	13
People of Puerto Rico v. Russell & Co., Sucesores, 288 U.S. 476 (1933)	19

Cited Authorities

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Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41 (2d Cir. 1996)	12, 16
Pope v. Crandall, No. 93 C 3061, 1994 WL 55731 (N.D. Ill. Feb. 22, 1994)	13
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Smith v. Alabama, 124 U.S. 465 (1888)	7
Standard Steamship Owners' Prot. & Indem. Ass'n (Bermuda) v. C&G Marine Serv., Inc., Civ. A. No. 92-0144, 1992 WL 111186 (E.D. La. May 13, 1992)	14
Stephens v. American Risk Mgmt., Inc., No. 89 Civ. 2999 (JSM), 1993 WL 43494 (S.D.N.Y. Feb. 18, 1993)	13
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United States v. Wong Kim Ark, 169 U.S. 649 (1898)	7, 8, 10

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United States ex: rel. Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943) 12

Whitehouse v. Ruedlinger, No. 92-4255-RDR, 1994 WL 113986 (D. Kan. Mar. 31, 1994) 13

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28 U.S.C. § 1332(a)(2) 1

28 U.S.C. § 1332(c)(1) 4, 18

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British Nationality Act 1981 ..... 1, 2, 4, 5

Other Authorities:

Black's Law Dictionary (7th ed. 1999) 10

Sir William Blackstone, *Commentaries on the Laws of England* (1813 ed.) 8

Sir Alexander James Edmund Cockburn, *Nationality* (1869) 8

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Financial Action Task Force on Money Laundering, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (June 22, 2000) 19

Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1 (1996) 11, 16, 17

James Kent, *Commentaries on American Law* (6th ed. 1848) 10

James H. Kettner, *The Development of American Citizenship, 1608-1870* (1978) 8, 9

John C. Miller, *The Federalist Era 1789-1801* (1960) 17

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Secretary of State for Foreign and Commonwealth Affairs, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (March 1999) 15

Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729 (2001) 17

Petitioner, The JPMorgan Chase Bank ("Chase"), formerly known as The Chase Manhattan Bank, submits this reply brief in further support of its appeal from the decision of the Second Circuit Court of Appeals which applied the holding of *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998) to the instant case and dismissed this action for lack of subject matter jurisdiction under 28 U.S.C. § 1332(a)(2).

In its opposing brief, Respondent Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream") does not rely on the rationale the Second Circuit adopted in *Matimak*. Indeed, Respondent never argues that the British Virgin Islands ("BVI") is a stateless entity as the Second Circuit held. Instead, Traffic Stream effectively concedes that BVI is subject to the sovereign authority of the United Kingdom, but claims that unless a sovereign, here the United Kingdom, adopts a statute stating that an entity is a "citizen" or "subject" in those literal words, alienage jurisdiction cannot exist under the federal alienage diversity statute. In arguing this point, Traffic Stream misapplies the law of the United Kingdom, which shows that BVI residents and corporations are United Kingdom subjects, as well as the basic policies of alienage diversity jurisdiction and the plain meaning of the statute itself.

ARGUMENT

I. Traffic Stream Improperly Bases Its Analysis On A Misreading Of An Inapplicable Nationality Statute, Without Reference To The Applicable Law Of The United Kingdom Or The United States

A. The Meaning of the Terms "Citizen" and "Subject" Must Be Decided Under the Constitution and Law of the United States

The lynchpin of Traffic Stream's argument is its claim that under the British Nationality Act 1981, the people and corporations from the United Kingdom's Overseas Territories are not denominated "citizens" or "subjects" of the United Kingdom, and hence may not invoke alienage diversity

jurisdiction. (*See* Resp. Br.[1] at 5, 25-31).[2] The United Kingdom, as *amicus curiae*, has clearly shown that the British Nationality Act is inapplicable and that under applicable United Kingdom law, BVI residents and corporations are, without doubt, United Kingdom subjects. (UK Br. at 9-23). Traffic Stream is also wrong in its claim that an examination of foreign law alone can determine the scope of federal alienage jurisdiction, as the *amicus curiae* brief of the United States explains. (US Br. at 20-25). Judge Sotomayor cogently explained this point:

> None would argue with the notion that a foreign state is entitled to define what persons or entities fall into its categories of "citizen" or "subject," or any other of a variety of legal forms that exist under its own domestic immigration, nationality, and commercial law. The domestic meaning that any particular country may give to the terms "citizen" or "subject" does not, however, bind our courts in determining whether an individual or entity falls within the statutory meaning of such terms as provided by our law of alienage jurisdiction. The wide disparity in meaning that exists among countries concerning such terms requires that our alienage jurisdiction be determined not according to the appearance of the words "citizen" or "subject" (or translation thereof) in the pages of a country's domestic code, but according to whether United States law deems such persons or entities to be "citizens or subjects" under our Constitution and statutes for the purpose of alienage diversity jurisdiction.

Koehler v. Bank of Bermuda (N.Y.) Ltd., 229 F.3d 187, 190 (2d Cir. 2000) (Sotomayor, J., dissenting).

What is controlling is the meaning that Congress and the Constitution intended by their use of the terms "citizen" or "subject" and, in particular, what is meant by a "subject" of a foreign state. The *amicus* brief for the United States details the plain meaning of "subject" under United States law. As the brief states, a subject is one "who owes allegiance to a sovereign and is governed by that sovereign's laws." (US Br. at 9). In this case, as demonstrated by the positions of the United States, the United Kingdom, and BVI itself, it is clear that the residents and corporations of BVI are subjects of the United Kingdom. Traffic Stream presents no contrary authority and no alternative definition for the term "subject" under United States law.

The Court should look to the nature of the relationship between the United Kingdom and the residents and corporations of its Overseas Territories, and the indicia which show that the Overseas Territories are under the sovereignty of the United Kingdom, and, thus, its residents and corporations should be considered United Kingdom "citizens or subjects" for alienage jurisdiction purposes. Traffic Stream's opposition does not dispute the vast evidence which shows that the United Kingdom exercises sovereignty over the individuals and corporations that reside in its Overseas Territories. In fact, at various points, it even argues that the United Kingdom can bind BVI through treaty, a clear demonstration of sovereignty. (Resp. Br. at 30, 38, 40; *see also* Pet. Br. at 21-24; UK Br. at 13-26). It is this evidence, as a whole, that the Court must look to — and not simply the terminology in one inapposite domestic statute — in order to determine whether Traffic Stream is a subject of the United Kingdom.

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1. References hereinafter to "Resp. Br. __" are to pages in the Brief for Respondent. References hereinafter to "Pet. Br. __" are to pages in the Brief for Petitioner dated February 19, 2002. References to "US Br. __" are to pages in the Brief for the United States as Amicus Curiae Supporting Petitioner dated February 2002. References hereinafter to "UK Br. __" are to pages in the Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner dated February 19, 2002.

2. Traffic Stream never mentions the other statute the *Matimak* court relied on, the British Companies Act 1948, and, thus, has apparently disavowed any reliance on that statute. Both Chase and the United Kingdom have explained *Matimak*'s misinterpretation of the British Companies Act. (Pet. Br. at 18-19; UK Br. at 11-12).

B. Traffic Stream's Reliance on the British Nationality Act is Misplaced

As demonstrated in the United Kingdom's *amicus* brief, the British Nationality Act 1981 does not control the outcome of this case. That Act determines certain immigration and travel rights within components of the United Kingdom, and has nothing to do with the body of United Kingdom law governing the relationship between the United Kingdom, its Overseas Territories, and their inhabitants and corporations. (*See* UK Br. at 12-13, 27-28). Nonetheless, Respondent attempts to draw distinctions based on the language of the Nationality Act to determine whether natural persons and corporations are citizens or subjects of the United Kingdom for alienage jurisdiction purposes. Relying on these distinctions, Respondent reaches incorrect conclusions with respect to individuals as well as corporations.

Traffic Stream admits that the Nationality Act does not apply to corporations. (Resp. Br. at 26). Contrary to Respondent's assertion, the nationality of a corporation is derived from the laws under which it is incorporated, not the laws governing the nationality of natural persons resident in the place of incorporation.[3] *See, e.g.*, *Matimak*, 118 F.3d at 79, 85 ("[A] corporation is a 'citizen' or 'subject' of the entity under whose sovereignty it is created.") (citing *National Steamship*

3. Traffic Stream argues that the Nationality Act should be applied to corporations because the old federal law "domestic theory" of corporations espouses that the shareholders of a corporation are all presumed to be citizens of the state of incorporation. (Resp. Br. at 27). The "domestic theory," however, was criticized, and in 1958, Congress amended 28 U.S.C. § 1332 to specifically provide that a corporation would be deemed a citizen of both the state in which it was incorporated as well as the state in which it had its principal place of business. 28 U.S.C. § 1332(c)(1). Thus, the legal fiction of the "domestic theory" was replaced by a "greater recognition of local corporate activity as equivalent to citizenship for diversity purposes." *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179, 190 (D. Del. 1960), *aff'd*, 313 F.2d 472 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963). Traffic Stream cites to no United Kingdom law on this point.

Co. v. Tugman, 106 U.S. 118, 121 (1882); *Restatement (Second) of the Foreign Relations Law of the United States* § 26 (1965)). As explained in the brief for the United Kingdom, BVI corporations are creatures of United Kingdom law by virtue of the constitutional relationship between BVI and the United Kingdom. (*See* UK Br. at 13-18).

Moreover, although Traffic Stream purports to rely on the "plain language" of the Nationality Act in reaching the conclusion that residents and corporations from the Overseas Territories are not citizens or subjects of the United Kingdom, the language of the Act provides no basis for this conclusion. The Nationality Act does not purport to define the terms "United Kingdom citizen" or "United Kingdom subject." The statute does use the terms "British citizen," "British subject" and "British Dependent Territories citizens," but nowhere does it provide that any of these groups are or are not citizens or subjects of the United Kingdom. While Traffic Stream opines that British citizens and British subjects are the only groups that "are amenable to 28 U.S.C. § 1332(a)(2)" (Resp. Br. at 26), the statute itself provides no basis for this conclusion, and Traffic Stream has not cited any authority to support it. Thus, Traffic Stream's statement that the "plain language" of the Nationality Act demonstrates that the United Kingdom has determined that "certain of its people are neither citizens nor subjects" is unsupported. (Resp. Br. at 27).

The logical absurdity of premising a United States federal court's jurisdiction on a semantic distinction drawn in a foreign country's domestic nationality statute is further demonstrated in Traffic Stream's assertion that the United Kingdom, by its unilateral legislative act, can create and deny a right of access to federal courts in the future. (Resp. Br. at 29). Thus, Traffic Stream asserts that residents of BVI had access to federal courts from 1948 until 1981 when the British Nationality Act changed their label from British subjects to British Dependent Territories citizens (Resp. Br. at 28) and that they may again have such access once the newly-enacted legislation granting "British

citizenship" to Overseas Territories citizens goes into effect. (Resp. Br. at 29 n.22). This argument ignores the reality of the United Kingdom's sovereignty over BVI, namely its method of governance, the treaties and conventions adopted on its behalf, the right to veto legislation, the judicial practice and appeal process and the United Kingdom's obligation to defend BVI and its residents. Those factors are what the United States looks to in determining whether sovereignty exists, not semantics.[4]

II. The Framers Of The Constitution's Alienage Diversity Clause And The Drafters Of The Alienage Diversity Statute Authorized Federal Jurisdiction Over The Present Suit

A. The Framers Intended the Terms "Citizens" or "Subjects" in Article III's Alienage Diversity Clause to Refer to All Those Who Owe Allegiance to, and Are Under the Protection of, a Foreign State

Traffic Stream asks this Court to construe the words "citizens" or "subjects" in a manner inconsistent with the historical understanding of those terms at the time the Constitution was adopted. "As an historical matter, the drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *See Koehler*, 229 F.3d at 191 (Sotomayor, J.,

4. As Judge Sotomayor wrote in discussing the perils of an over-technical reading of foreign law:

> The reasoning of *Matimak* applied to all foreign corporations would produce an absurd result. The term "national" is often used instead of "citizen" or "subject" to describe the identity of a foreign corporation. If indeed courts must rely solely on the words found in the domestic codes of other countries and there we discover that corporations are referred to only as "nationals" and not as "subjects" or "citizens" of a particular country, the *Matimak* analysis would force us to deny them access to the federal courts.

Koehler, 229 F.3d at 193 n.13 (Sotomayor, J., dissenting) (citation omitted).

dissenting) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844)). In choosing these words, the Framers incorporated into the Constitution the commonly understood principle of that time that the word "subject" included all persons who owe allegiance to, and are under the authority of, a sovereign government. (*See* US Br. at 15 n.11 (citing several English language dictionaries and other sources that defined the term "subject" during the relevant time period)). The Framers also included the word "citizen" in the alienage diversity clause, but the term "citizen" as understood at the time was "precisely analogous to the term 'subject'" under English common law. *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898).

Traffic Stream inaccurately asserts that the Framers had no fixed or definite notion of the meaning of the terms "citizens" or "subjects." This Court has repeatedly stated that the Constitution "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution." *Wong Kim Ark*, 169 U.S. at 654; *Schick v. United States*, 195 U.S. 65, 69 (1904); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (stating that the "interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history"). The fundamental principle of English common law at the time the Constitution was adopted was that anyone born in the British Empire (including the British colonies) was considered a British subject. This fundamental principle was clearly stated by Sir Edward Coke in *Calvin's Case*, 77 Eng. Rep. 377, 407 (1608) (finding that whosoever was born under the King of England's power or protection was considered a subject of England).

The English common law embraced this fundamental notion. *See Wong Kim Ark*, 169 U.S. at 656 (citing numerous

examples of English authorities that followed the ruling and reasoning of *Calvin's Case* with respect to this notion). For example, Lord Blackstone concluded in his *Commentaries on the Laws of England* that "[n]atural-born subjects are such as are born within the dominions of the crown of England." 1 Sir William Blackstone, *Commentaries on the Laws of England* 372 (1813 ed.).[5] After an extensive examination of English common law with respect to the definition of the term "subject" at the time of the Constitution, this Court also confirmed that "every person born within the dominions of the crown . . . was an English subject" except for "the children of foreign ambassadors, . . . or a child born to a foreigner during the hostile occupation of any part of the territories of England." *Wong Kim Ark*, 169 U.S. at 657 (quoting Sir Alexander James Edmund Cockburn, *Nationality* 7 (1869)).

Traffic Stream attempts to confuse this relatively straightforward application of the English common law by introducing the concept of volitional allegiance and arguing that the American view of subjectship was in constant flux at the time the Constitution was adopted. The American view of volitional allegiance that developed in the Revolutionary era is irrelevant to the determination of the meaning of the term "subject." "Allegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject." 1 Blackstone, *supra*, at 372. Under the American view of volitional allegiance developed during the American Revolution, a government has an affirmative obligation to protect the fundamental rights of its subjects, and if a government fails in this obligation, its subjects no longer owe any allegiance to the government. *See* James H. Kettner, *The Development of American Citizenship, 1608-1870* at 173-209 (1978). This developing view of allegiance contrasted with the traditional English view of perpetual allegiance (once a subject always a subject). *Id.* at 44-61.

5. "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick*, 195 U.S. at 69.

The emergence of this new political theory of volitional allegiance, however, did not alter or destroy the underlying common law meaning of the term "subject." The concept of allegiance refers only to the rights and obligations possessed by a subject of a particular government, not the underlying definition of the term "subject." It is true that, under the American view, subjects can voluntarily renounce their subjectship and therefore change their status as subjects. *Id.* at 173-209. However, there is no evidence that any of the United Kingdom's Overseas Territories have chosen to renounce their subjectship as the Americans did in the Declaration of Independence. In fact, BVI, the Overseas Territory specifically at issue in the present case, has confirmed that its residents and corporations are subject to the sovereignty of the United Kingdom. The Attorney General for BVI, Cherno S. Jallow, issued a statement, dated February 3, 2000, that fully supports the conclusion that residents and corporations of BVI are subjects of the United Kingdom. *See* L 35-36[6] ("On behalf of the Government of the British Virgin Islands, I fully support the arguments and conclusions presented in the Brief of the United Kingdom."). Accordingly, Respondent's discussion of allegiance is inapplicable to the present case.

Moreover, Traffic Stream's suggestion that the Framers intended the basic and fundamental underlying meaning of the term "subjects" in the alienage diversity clause to be flexible, fluid and adaptable to accommodate any change in notions of the relation between individual and state is simply incorrect. Contrary to Traffic Stream's assertion, the meaning of the term "subject" has remained relatively constant throughout American constitutional history. In 1830, Justice Story recognized that the "rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject[.]" *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting). This Court also recognized,

6. References to "L __" are to pages in the Lodging filed with the Supreme Court.

over one hundred years after the Constitution was adopted, that "we are, equally with the inhabitants of all other countries, 'subjects,' for we are equally bound by allegiance and subjection to the government and the law of the land." *Wong Kim Ark*, 169 U.S. at 665 (quoting 2 James Kent, *Commentaries on American Law* 258 n.b. (6th ed. 1848)). The term "subject" even retains its original meaning in modern sources and authorities and includes any person or entity that "owes allegiance to a sovereign and is governed by that sovereign's laws." *See Black's Law Dictionary* 1438 (7th ed. 1999); *see also* US Br. at 9 n.2 (citing several common dictionary definitions of "subject" at various periods of time).

B. Congress Drafted the Alienage Diversity Statute to Extend Alienage Jurisdiction to the Limits of the Constitution

The origin and history of the alienage diversity statute establishes that the underlying meaning of the terms "citizens" and "subjects" as applied to alienage diversity jurisdiction remained constant since the adoption of the Constitution. The alienage diversity statute has consistently granted federal courts jurisdiction over suits between a citizen of a state and those under the authority of a foreign state. Contrary to Traffic Stream's confusing arguments and assertions, that grant of federal jurisdiction extends to suits between citizens of a State and corporations existing under the laws of the United Kingdom's Overseas Territories.

As set forth in the *amicus* brief of the United States, Congress codified Article III's grant of alienage diversity jurisdiction through a series of statutory enactments. (US Br. at 16-20). Congress intended the language employed in each of these enactments to be synonymous with the terms "citizens" or "subjects" of a foreign state as understood by the Framers of the Constitution. The specific language Congress used in codifying alienage diversity jurisdiction therefore supports the conclusion that the Framers intended the terms "citizens" or "subjects" of a foreign state to include any person under the

sovereign authority of a foreign state. Traffic Stream cites no valid authority to the contrary.

Despite essentially conceding that Congress intended to extend alienage diversity jurisdiction under the Judiciary Act of 1789 to all aliens (Resp. Br. at 13), Traffic Stream erroneously asserts that the domestic treatment of Native Americans and residents of the District of Columbia and the American territories for diversity purposes somehow suggests that Congress also intended to exclude residents of foreign territories when it enacted the Judiciary Act of 1789. The treatment of Native Americans and residents of the District of Columbia and the American territories is immaterial to the present issue because alienage and diversity jurisdiction "should be treated as analytically distinct." *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 5 (1996).

Diversity jurisdiction extends only over controversies between "citizens of different States." 28 U.S.C. § 1332(a)(1). Obviously, residents of the District of Columbia and the American territories were not considered citizens of any particular state at the time, so they initially could not invoke diversity jurisdiction. *See Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805); *Corporation of New-Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816). Native Americans, because of their quasi-sovereign status, likewise were not "citizens" of any state and therefore were not amenable to diversity jurisdiction. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987). The determination that Native Americans and the residents of the District of Columbia and the American territories were not "citizens" of any State has no bearing on Congress' understanding of the terms "citizens" or "subjects" of a foreign state.

Traffic Stream asserts that the enactment of the Alien Enemies Act of 1798 somehow demonstrates that Congress recognized inherent class distinctions in the treatment of foreign

nationals and that some foreign nationals were not considered by Congress to be "citizens" or "subjects" of a foreign state. The rationale for the Alien Enemies Act is radically different than that underlying the alienage diversity statute. The Alien Enemies Act was enacted to include within its ambit all individuals who might be likely to favor a hostile nation or government because of ties of nativity or allegiance, and therefore commit acts dangerous to the public safety of the United States if allowed to remain at large. *United States ex. rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943). It was necessarily broader than the alienage diversity section of the Judiciary Act of 1789 for national security reasons because it was intended to apply to all individuals who had any ties to a hostile nation, even those who might not be considered a "citizen" or "subject" of a foreign state. *Id.*; *see, e.g.*, *Ex parte Gregoire*, 61 F. Supp. 92 (N.D. Cal. 1945) (French citizen subject to removal during World War II because he was born in Germany). The Alien Enemies Act is therefore inapplicable and sheds no light on the proper interpretation of the Judiciary Act of 1789.

Traffic Stream, without any support, asserts that there is not "a long-standing line of cases in which the residents of [United Kingdom Overseas Territories] had routinely sued and been sued in federal courts on the basis of alienage diversity jurisdiction." (Resp. Br. at 24). This is wrong. Within the fifteen years prior to the *Matimak* decision alone, there have been at least forty reported decisions in federal courts where one of the parties was a resident or corporation of a United Kingdom Overseas Territory and the court stated that jurisdiction was based on diversity. These are presumably only a fraction of the total cases filed since many cases generate unpublished decisions or no decisions at all.[7]

7. *See, e.g.*, *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996) (BVI plaintiff); *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1106-07 (10th Cir. 1991) (Bermuda plaintiff); (Cont'd)

(Cont'd)
Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1209-10 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991) (Bermuda defendant); *Koteen v. Bermuda Cablevision, Ltd.*, 913 F.2d 973, 974 (D.C. Cir. 1990) (Bermuda defendant); *Centurion Reinsurance Co. v. Singer*, 810 F.2d 140, 142 (7th Cir. 1987) (Cayman Islands plaintiff); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 39-40 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987) (Bermuda plaintiff); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1395 (9th Cir. 1986) (Cayman Islands defendant); *Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992, 994-95 (9th Cir. 1983) (Bermuda plaintiff); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735 (2d Cir. 1983) (Bermuda plaintiff); *Meritxell, Ltd. v. Saliva Diagnostic Sys., Inc.*, No. 96 Civ. 2759 (JFK), 1997 WL 411466 at *1 (S.D.N.Y. July 18, 1997) (Gibraltar plaintiff); *Signal Mut. Indem. Ass'n v. Rice Mohawk U.S. Constr.*, No. 95 Civ. 3721 (LMM), 1996 WL 337294 at *1-2 (S.D.N.Y. June 19, 1996) (Bermuda plaintiff); *Maleski v. Conning & Co.*, No. Civ. A. 94-7507, 1995 WL 570466 at *1 (E.D. Pa. Sept. 27, 1995) (Bermuda defendant); *Gordon v. Long Bay (1980) Ltd.*, No. 94 Civ. 2141 (SHS), 1995 WL 489474 at *1 (S.D.N.Y. Aug. 16, 1995) (BVI defendant); *Leslie v. Construcciones Aeronauticas*, 896 F. Supp. 243, 245-47 (D.P.R. 1995) (BVI plaintiff); *One Hundred Pearl Ltd. v. Vantage Sec., Inc.*, 887 F. Supp. 636, 637-38 (S.D.N.Y. 1995) (BVI plaintiff); *Whitehouse v. Ruedlinger*, No. 92-4255-RDR, 1994 WL 113986 at *1-2 (D. Kan. Mar. 31, 1994) (Bermuda defendant); *Forest Ins., Ltd. v. American Motorists Ins. Co.*, No. 89 Civ. 4326 (BN), 1994 WL 97138 at * 1 (S.D.N.Y. Mar. 21, 1994) (Bermuda plaintiff); *Insurance Co. of N. Am. v. Pyramid Ins. Co. of Bermuda Ltd.*, No. 92 Civ. 1816, 1994 WL 88701 at *1 (S.D.N.Y. Mar. 16, 1994) (Bermuda defendant); *Pope v. Crandall*, No. 93 C 3061, 1994 WL 55731 at *1 (N.D. Ill. Feb. 22, 1994) (Bermuda defendant); *Harper-Wyman Co. v. In-Bond Contract Mfg., Inc.*, No. 93 C 2992, 1994 WL 22321 at *1-2 (N.D. Ill. Jan. 24, 1994) (Cayman Islands defendant); *N.F.L. Ins. Ltd. v. B & B Holdings, Inc.*, No. 91 Civ. 8580 (PKL), 1993 WL 78090 at *1, 9 (S.D.N.Y. Mar. 18, 1993) (Bermuda plaintiff); *Stephens v. American Risk Mgmt., Inc.*, No. 89 Civ. 2999 (JSM), 1993 WL 43494 at *2, 8 (S.D.N.Y. Feb. 18, 1993) (Bermuda and Cayman Islands defendants); *P.W. Stephens Contractors, Inc. v. Mid Am. Indem. Ins. Co.*, 805 F. Supp. 854, 856 (D. Haw. 1992) (Cayman Islands defendant); *Good Humor Corp. v. Popsicle* (Cont'd)

(Cont'd)

Japan K.K., 810 F. Supp. 1001, 1003 (E.D. Wis. 1992) (BVI defendant); *Standard Steamship Owners' Prot. & Indem. Ass'n (Bermuda) v. C&G Marine Serv., Inc.*, Civ. A. No. 92-0144, 1992 WL 111186 at *1-2 (E.D. La. May 13, 1992) (Bermuda plaintiff); *Dominick & Dominick, Inc. v. George Town Sec., Ltd.*, No. 91 Civ. 4080 (CSH), 1992 WL 88200 at *1-2 (S.D.N.Y. Apr. 17, 1992) (Cayman Islands defendants); *Milgrim Thomajan & Lee P.C. v. Nycal Corp.*, 775 F. Supp. 117, 118 (S.D.N.Y. 1991) (Bermuda defendant); *Heyman v. Massler*, No. 84 Civ. 888 (BN), 1991 WL 125259 at *1 (S.D.N.Y. June 28, 1991) (Gibraltar plaintiff); *Bruemmer v. Marriott Corp.*, No. 90 C 4190, 1991 WL 30141 at *1-2 (N.D. Ill. Mar. 4, 1991) (Bermuda defendant); *Charles Ulmer, Inc., Sailmakers v. Van Ost*, No. 89 Civ. 7897 (SWK), 1991 WL 29277 at *1 (S.D.N.Y. Feb. 26, 1991) (BVI defendant); *Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159, 160 (S.D.N.Y. 1991) (BVI plaintiff); *Banco Nominees Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1071, 1077 (D. Del. 1990) (Bermuda plaintiffs); *Clarendon Group, Ltd. v. Smith Labs., Inc.*, 741 F. Supp. 1449, 1450-52 (S.D. Cal. 1990) (Bermuda plaintiff); *International Capital Equip., Ltd. v. Computer Atlanta, Inc.*, 715 F. Supp. 371, 371-72 (N.D. Ga. 1989) (Bermuda plaintiff); *Fireman's Fund Ins. Co. v. Fraund*, No. 88 Civ. 2765 (MBM), 1989 WL 31490 at *1 (S.D.N.Y. Mar. 31, 1989) (Bermuda defendant); *National Union Fire Ins. Co. of Pittsburgh v. Walton Ins. Ltd.*, 696 F. Supp. 897, 898, 902 (S.D.N.Y. 1988) (Bermuda defendant); *International Minerals & Chem. Corp. v. Cotia Comercio Exportacao E Importacao S.A.*, No. 85 Civ. 5763 (MJL), 1988 WL 42165 at *1 (S.D.N.Y. Apr. 26, 1988) (Cayman Islands defendant); *Young v. Pannell Fitzpatrick & Co.*, 641 F. Supp. 581, 583-85 (D.P.R. 1986) (BVI defendant); *Detroit Bank & Trust Co. of Detroit v. Trust Co. of the Virgin Islands, Ltd.*, 644 F. Supp. 444, 446, 450 (D.P.R. 1985) (BVI defendant); *Credit Life Ins. Co. v. Uniworld Ins. Co.*, 94 F.R.D. 113, 113-14 (S.D. Ohio 1982) (Bermuda defendant); *see also I. Oliver Engebretson, Inc. v. Aruba Palm Beach Hotel & Casino*, 587 F. Supp. 844, 846, 848 (S.D.N.Y. 1984) (Aruba and Netherlands Antilles defendants).

III. Denial Of Alienage Jurisdiction To Residents And Corporations From The United Kingdom's Overseas Territories Vitiates The Primary Reasons For Such Jurisdiction

A. Traffic Stream Incorrectly Asserts that the Underlying Reasons for Alienage Jurisdiction are Not Present

It is uncontroversial, and well documented, that the twin policy reasons behind the Framers' inclusion of alienage diversity jurisdiction were to prevent foreign entanglements and to promote commerce with foreign nations. (*See* Pet. Br. at 10-14; US Br. at 12-16; Resp. Br. at 13 n.11 ("The foreign entanglements justification and the commerce justification are old and familiar.")) Yet, despite recognizing that these policies are "old and familiar", Traffic Stream then attempts to escape the inevitable fact that they are indeed implicated by the Second Circuit's decisions in *Matimak* and the cases that followed *Matimak*, including this case.

Traffic Stream alters the foreign entanglement concern by reclassifying it as a policy of preventing bias against foreigners and to a certain extent arguing that any sovereignty exercised by the United Kingdom should be discounted because it is an invalid "colonial" power. The latter argument may be summarily rejected. First, the policies of a foreign state, once the state is recognized by the United States, are irrelevant to the issue of preventing entanglements with it. Second, it ignores the reality, as the United Kingdom has made clear, that the Overseas Territories will retain their connection to the United Kingdom only so long as they choose to do so. *See* Secretary of State for Foreign and Commonwealth Affairs, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* 4, 12 (March 1999).

The bias argument is equally fallacious. The Framers' policy of prevention of entanglements led to allowing foreigners to sue and be sued in a federal forum which would be perceived as neutral so that foreign governments would not be hostile to the

United States as a result of perceived unfair treatment of their subjects. The policy was not and is not dependent on the position of the litigant in any action. Thus, Traffic Stream's assertion that it is the only party who can validly assert the entanglement issue confuses the "bias" argument in regular diversity cases with the entanglement issue in alienage jurisdiction, where the concern is the offending of a foreign sovereign, not bias in an individual case. *See* Johnson, *supra*, at 6, 20, 31 (noting that the mere perception of bias, alone, can have an impact on foreign relations, and that this influenced the Framers to create alienage diversity jurisdiction). In short, the issue of whether residents and corporations of the United Kingdom's Overseas Territories may sue or be sued in federal court under alienage jurisdiction is much larger than Traffic Stream's individual preference,[8] as is shown by the United Kingdom's and United States' participation in this matter as *amici*.

Traffic Stream's assertion that the promotion of commerce policy is not present in this case is inexplicable. Traffic Stream attempts to carve out a hitherto unsuspected exclusion to that conceded policy based on the erroneous assumption that the

8. Traffic Stream's newfound preference for state court, presumably because it would further delay its ultimate liability, should be disregarded by this Court. Prior to the Second Circuit raising the issue, Traffic Stream consented to jurisdiction in the federal courts, which belies its statement that there was "plain Second Circuit authority that there was no subject matter jurisdiction." (Resp. Br. at 32-33). The reality is that at the time this action was filed, in 1999, the Second Circuit's authority was far from "plain" because: (1) there were numerous cases upholding jurisdiction including the recent Second Circuit decision involving a BVI party (*Peregrine Myanmar Ltd.*, 89 F.3d at 45 n.4); (2) *Matimak* involved an arguably *sui generis* situation in that Hong Kong was in a state of flux because it was about to be returned to China; and (3) *Matimak* had been roundly criticized by commentators (*See* Pet. Br. at 8 n.7 (listing articles critical of *Matimak*)). The Second Circuit, itself, did not indicate that it would apply *Matimak* to other United Kingdom Overseas Territories until it decided *Koehler v. Bank of Bermuda (N.Y.) Ltd.*, 209 F.3d 130 (2d Cir. 2000), after the complaint in this action had been filed and summary judgment granted. (*See* JA 7a-24a).

Framers disregarded Caribbean or "colonial" trade. There is no basis for such an assertion. The Caribbean islands, which at that time consisted of colonies of various European states, were important trading partners of the United States given their proximity to the United States. *See*, *e.g.*, John C. Miller, *The Federalist Era 1789-1801* at 220-21, 227 (1960) (during the undeclared war with France in the late 1790s Great Britain protected American shipping in the Caribbean and relaxed its laws of "Trade and Navigation" to open its colonies to American trade). The Framers were concerned with promoting commerce, whatever the source. *See* Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729, 746-47 (2001) (concluding, based on the later writings of Alexander Hamilton, that "the Framers were not concerned with whether or not the source of that capital was the citizen or subject of a recognized sovereign state"). Today, there is significant trade between the United States and the United Kingdom's Overseas Territories, and the impact of denying such foreign entities access to federal courts is significant. (*See* Pet. Br. at 31-33, US Br. at 24-25).

B. Traffic Stream's Alternative Policy Concerns Are Not Valid

Traffic Stream attempts to assert several new policies that it claims are implicated by this case. None of them has merit.

First, Traffic Stream asserts that a policy consideration of the Framers in drafting the alienage diversity jurisdiction provisions of the Constitution and the Judiciary Act was the promotion of immigration. The only authority for this novel argument is an obscure reference by one delegate made in protest to the passage of an entirely different statute with entirely different purposes, the Alien Enemies Act.[9] (Resp. Br. at 35) (*see also* discussion, *supra*, at 11-12). There is no evidence

9. Indeed, it is clear that some of the Framers opposed immigration. "Benjamin Franklin, for example, was well known for deriding German immigration to Pennsylvania. . . ." Johnson, *supra*, at 15.

whatsoever that the promotion of immigration was a primary policy reason for alienage diversity jurisdiction.

Second, Traffic Stream argues that the rule in *Matimak* would help prevent expatriation of United States businesses to the United Kingdom's Overseas Territories, which Traffic Stream characterizes, based on hearsay newspaper articles, as offshore tax and bank havens. (Resp. Br. at 36). The undisputed record in this case reveals that Traffic Stream is not an expatriated United States business, but rather a BVI corporation that through its subsidiaries builds and operates toll road projects in China. (JA 9a). Leaving aside the lack of any record on this point, Traffic Stream's argument seems to be that such former United States corporations should lose their ability to litigate in the federal courts because they are now incorporated in purported tax havens. It goes without saying that this is ultimately a policy decision for Congress.[10]

Third, Traffic Steam apparently believes that this Court should rewrite the Judiciary Act in order to deny alienage diversity jurisdiction to the residents and corporations of the United Kingdom Overseas Territories as a means to punish these areas because they allegedly help foster unspecified criminal enterprises, or alternatively to use the withholding of such jurisdiction as an incentive for a treaty with the United Kingdom to force greater scrutiny of commercial transactions in BVI. (Resp. Br. at 38). There is no authority for such a breathtaking proposition, nor is there any factual predicate on this record or otherwise for such unsupported statements about alleged

10. Legally Traffic Stream's argument is not well founded. A corporation, for diversity purposes, will be deemed a citizen of the state in which it is incorporated, as well as the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). Although there is a split in authority, some courts have held that for purposes of determining diversity jurisdiction, a foreign corporation with a principal place of business in the United States will be considered a citizen of both the foreign country and the United States state. *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 35 (5th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); *Clifford Corp., N.V. v. Ingber*, 713 F. Supp. 575, 576-77 (S.D.N.Y. 1989).

criminal enterprises.[11] Even if such concerns exist, this is clearly an area for Congress and the executive branch to address, not the Court. *See Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

Traffic Stream also levels a general criticism at BVI's International Business Corporations ("IBCs") and claims that such companies should reincorporate in the country or U.S. State where they have a primary place of business. Once again, Traffic Stream would have this Court make a jurisdictional determination based on a perceived foreign policy goal. In the jurisdictional context, courts have long held that it is not their task to judge the propriety of the entities (corporate or otherwise) that another nation may recognize as its citizen or subject. *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 917 F.2d 278, 285 (7th Cir. 1990) (recognizing that the Church was a distinct juridical entity under the laws of Cyprus and thus a "citizen or subject" of that state); *Cohn v. Rosenfeld*, 733 F.2d 625, 630 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (holding that Liechtenstein regarded its *anstalts* as juridical entities and that "[a]ny further limitation on the standing of these 'citizens or subjects' of foreign states would involve judicial encroachment on the sovereignty of the nation that formed them."); *cf. People of Puerto Rico v. Russell & Co., Sucesores*, 288 U.S. 476, 481-82 (1933) (concluding that entities created under Puerto Rican law known as *sociedades en comandita* were "juridical persons" that had the right to contract, own property and transact business).

11. BVI does not have bank secrecy laws (Financial Action Task Force on Money Laundering, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* 3, 15 (June 22, 2000)) and is a well-recognized common law jurisdiction which the world's capital markets rely upon for its well-established legal system and corporate law in raising investment for entities such as Traffic Stream who might not otherwise have access to the capital markets.

Finally, Traffic Stream appears to believe that the Second Circuit's decision should be upheld in furtherance of the "international policy of decolonization." (Resp. Br. at 41-42). In making such a claim, Respondent asserts that the United States and the United Kingdom "cannot hide from the consequences" of policies which allegedly keep BVI residents in a condition lacking internal and international power. These remarks demonstrate Respondent's utter misconception of the conceptual framework on which alienage jurisdiction rests, namely whether an entity is subject to the sovereignty of a foreign state. At the end of the day, even Traffic Stream does not deny that BVI residents and corporations are subject to the United Kingdom's sovereignty. It is thus clear they fall within the meaning of the alienage diversity statute.

CONCLUSION

For all the reasons set forth herein and in Petitioner's initial brief and in the briefs of its *amici curiae*, the decision of the United States Court of Appeals for the Second Circuit should be reversed, and the matter remanded to the Second Circuit for a decision on the merits of Traffic Stream's appeal.

Dated: April 10, 2002

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